No. 02-628

IN THE
Supreme Court of the United States

LINDA FREW, on behalf of her daughter,
Carla Frew, *et al*.,

Petitioners,

v.

ALBERT HAWKINS, Commissioner of the
Texas Health and Human Services Commission, *et al.*,

Respondents.

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

BRIEF FOR PETITIONERS

SUSAN FINKELSTEIN ZINN
Counsel of Record
P.O. Box 15126
San Antonio, TX 78212
(210) 734-0425

EDWARD B. CLOUTMAN III
3301 Elm Street
Dallas, TX 75226
(214) 939-9222

JANE KATHRYN SWANSON
2202 Timberloch Place, #112
The Woodlands, TX 77380
(281) 367-4483

PROFESSOR BARBARA BADER ALDAVE
UNIVERSITY OF OREGON
SCHOOL OF LAW
1515 Agate Street
Eugene, OR 97403
(541) 346-3985

Attorneys for Petitioners

180692

A

((800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Do State officials waive Eleventh Amendment immunity by urging the district court to adopt a consent decree when the decree is based on federal law and specifically provides for the district court's ongoing supervision of the officials' decree compliance?

2. Does the Eleventh Amendment bar a district court from enforcing a consent decree entered into by State officials unless the plaintiffs show that the "decree violation is also a violation of a federal right" remediable under § 1983?

LIST OF PARTIES TO THE PROCEEDING BELOW

Petitioners:

Linda Frew, as next friend of her minor child, Carla Frew,

Maria Ayala, as next friend of her minor children, Christopher Arizola, Leonard Jimenez and Joseph Veliz,

Mary Fisher, as next friend of her minor child, Tyrone T. Edwards,

Mary Jane Garza, as next friend of her minor children, Hilary Garza and Sarah Renea Garza,

Charlotte Garvin as next friend of her minor children, Johnny Martinez, Brooklyn Garvin and BreAnna Garvin, and

Shannon Garcia, as next friend of her minor children, Andrew Garcia, Marisha Garcia, Stephen Sanchez and Allison Sanchez

Respondents, all sued in their official capacities only:

Albert Hawkins, Texas Commissioner of Health and Human Services,

Jason Cooke, Texas State Medicaid Director,

Eduardo Sanchez, MD, Texas Commissioner of Health,

Bridgett Cook, employee of Texas Department of Health, and

Susan Penfield, MD, employee of Texas Department of Health

Notes of Explanation: The style of this case in the district court is *Frew v Gilbert*; in the court of appeals the style is *Frazar v Gilbert*. Plaintiff Frazar is not before this Court because the district court voluntarily dismissed her in 1994.

Further, when Petitioners sought a writ of certiorari in this Court, Don Gilbert was the lead Respondent. He has since resigned so Petitioners have substituted his successor in office, Albert Hawkins, Texas Commissioner of Health and Human Services. Linda Wertz has also resigned so Petitioners have substituted her successor in office, Jason Cooke, Texas State Medicaid Director.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES TO THE PROCEEDING BELOW ii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES x

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

A. The Children's Suit for EPSDT Services . . . 2

B. After Discovery And Lengthy Negotiations, The Parties Propose The Consent Decree . . . 4

C. The District Court Approves The Consent Decree, As Urged By The Texas Attorney General 6

D. The State Officials' Actions After Entry Of The Decree Demonstrate Their Continued Assent To The Order And The District Court's Jurisdiction Over Them 7

E. The Children's Motion To Enforce The Consent Decree 7

Contents

Page

F. THE DISTRICT COURT'S MEMORANDUM OPINION AND REMEDIAL ORDER TO ENFORCE THE CONSENT DECREE 8

1. Jurisdiction To Enforce The Decree . . . 8

2. State Officials Violated The Decree . . . 11

G. THE DISTRICT COURT'S FORWARD-LOOKING REMEDIAL ORDER ACCOMMODATES THE OFFICIALS' EXERCISE OF DISCRETION 13

H. THE COURT OF APPEALS' DECISION 13

1. According To The Fifth Circuit, The Officials Did Not Waive The Eleventh Amendment 13

2. According To The Court Of Appeals, A Consent Decree Can Be Enforced Only If A Decree Violation Is Also A Violation Of Federal Rights. 14

SUMMARY OF ARGUMENT 14

ARGUMENT 18

I. WHEN STATE OFFICIALS ACTIVELY URGE A FEDERAL COURT TO ENTER A CONSENT DECREE THAT 1) SPECIFICALLY PROVIDES FOR THE FEDERAL COURT'S ONGOING SUPERVISION OF DECREE COMPLIANCE AND 2) BY ITS OWN TERMS CREATES

Contents

Page

"MANDATORY, ENFORCEABLE" OBLIGATIONS, THEY WAIVE SOVEREIGN IMMUNITY FROM DECREE ENFORCEMENT 18

A. STATE OFFICIALS WAIVE SOVEREIGN IMMUNITY FROM DECREE ENFORCEMENT BY VOLUNTARY, CLEAR LITIGATION ACTS THAT INVOKE THE COURT'S JURISDICTION. 21

B. IN THIS CASE, LITIGATION CONDUCT WAIVED SOVEREIGN IMMUNITY AS TO DECREE ENFORCEMENT 22

1. The Officials Actively Pursued The Decree 22

2. Waiver Was Voluntary 24

a. State officials can voluntarily waive immunity even though they are defendants 25

b. The officials' assertion of sovereign immunity before or after they waived it does not defeat their waiver of the Eleventh Amendment's protections as to decree enforcement 26

3. Waiver Was Clear And Unequivocal 26

Contents

Page

a. The court of appeals applied the wrong legal test to determine clarity of waiver 28

b. The State officials' denial of liability in the decree does not defeat their waiver of immunity 29

4. The Texas Attorney General Has Authority To Waive Eleventh Amendment Immunity During Litigation 29

C. IT WOULD IMPUGN THE COURTS' INTEGRITY TO ALLOW STATE OFFICIALS TO ACTIVELY URGE A COURT TO ENTER A DECREE AND THEN ASSERT THAT THE COURT LACKS JURISDICTION TO ENFORCE THE DECREE 31

D. SOVEREIGN IMMUNITY DOES NOT BAR THE DISTRICT COURT'S ENFORCEMENT ORDERS BECAUSE THOSE ORDERS ARE ANCILLARY TO THE CONSENT DECREE AND THE DISTRICT COURT HAS JURISDICTION OVER THE DECREE 33

II. *EX PARTE YOUNG* PERMITS ENFORCEMENT OF A CONSENT DECREE THAT IS BASED ON FEDERAL LAW AGAINST STATE OFFICIALS, EVEN IF DECREE VIOLATIONS ARE NOT ALSO VIOLATIONS OF FEDERAL RIGHTS 34

Contents

Page

A. In *Ex parte Young* Cases, Sovereign Immunity Does Not Bar Forward-Looking Enforcement Of A Decree That Provides Prospective Relief 34

B. The Eleventh Amendment Does Not Require A Federal Court To Find A Violation Of A Federal Right Before Enforcing A Consent Decree 36

C. The Eleventh Amendment Should Not Require A "Public Mea Culpa" Or Finding That State Officials Violate Federal Law Before A Consent Decree Can Be Enforced 37

D. The Lower Court's Rule Unduly Restricts Federal Courts' Equitable Powers 38

E. Contrary To Principles Of Basic Fairness, Under The Court Of Appeals' Rule It Would Be Impossible For Consent Decrees To BE "Specific In Terms" And "Describe In Reasonable Detail ... The Act Or Acts Sought To Be Restrained" When State Officials Are Defendants. Fed. R. Civ. P. 65(d) 40

F. Contrary To Important Principles Of Judicial Administration, The Court OF Appeals' Rule Would Make Consent Decrees Useless In Cases Against State Officials 41

Contents

Page

G. When A Federal Court Properly Enters A Consent Decree In A Case Based On Federal Law, Sovereign Immunity Does Not Bar Enforcement Of The Decree Against State Officials 42

1. Congress' Purposes In Medicaid And EPSDT 43

2. The Consent Decree Furthers Congress' Purposes In Medicaid And EPSDT 45

CONCLUSION 49

TABLE OF CITED AUTHORITIES

Page

CASES

Alden v Maine, 527 U.S. 706 (1999) . . 15, 18, 19, 20, 35

Bell v Wolfish, 441 U.S. 520 (1979) 38

Clark v Barnard, 108 U.S. 436 (1883) 19, 21, 22

College Sav. v Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) 21, 26, 28

Cooper v Aaron, 358 U.S. 1 (1958) 33

Coopers & Lybrand v Livesay, 437 U.S. 463 (1978) . 37

Dunn v New York State Dep't of Labor, 47 F.3d 485 (2d Cir. 1995) 46

Duran v Carruthers, 885 F.2d 1485 (10th Cir. 1989), *cert. denied*, 493 U.S. 1056 (1990) 36

Evans v Jeff D., 475 U.S. 717 (1986) 19

Ex parte Young, 209 U.S. 123 (1908) . . . . . *passim*

Firefighters v City of Cleveland, 478 U.S. 501 (1986) . . . . . *passim*

Gardner v State of New Jersey, 329 U.S. 565 (1947) 21, 22, 27

Gates v Collier, 501 F.2d 1291 (5th Cir. 1974) 39

Cited Authorities

Page

Gonzaga v Doe, 536 U.S. 273 (2002) 2, 25, 45

Green v Mansour, 474 U.S. 64 (1985) 16, 35, 41

Gunter v Atlantic Coast Line R. Co., 200 U.S. 273 (1906) . . . . . *passim*

Hans v Louisiana, 134 U.S. 1 (1890) 19

Hook v State of Ariz. Dep't. of Corrections, 972 F.2d 1012 (9th Cir. 1992) 32

Hutto v Finney, 437 U.S. 678 (1978) 46

Idaho v Coeur d'Alene Tribe, 521 U.S. 261 (1997) 34, 36

Johnson v Zerbst, 304 U.S. 458 (1938) 26

Kokkonen v Guardian Life Ins., 511 U.S. 375 (1994) . . . . . *passim*

Komyatti v Bayh, 96 F.3d 955 (7th Cir. 1996) 36

Kozlowski v Coughlin, 871 F.2d 241 (2d Cir. 1989) 31, 36, 42

Lapides v Bd. of Regents of Univ. System, 535 U.S. 613 (2002) . . . . . *passim*

Lawyer v Dep't. of Justice, 521 U.S. 567 (1997) 19, 25, 37

Page

Lelsz v Kavanagh, 807 F.2d 1243, 1252 (5th Cir. 1987) (*Lelsz I*), *reh'g en banc denied*, 815 F.2d 1034 (*Lelsz II*), *subsequent panel decision*, 824 F.2d 372 (*Lelsz III*), *cert. dismissed*, 483 U.S. 1057 (1987) 8, 9, 14, 36, 48

Lelsz v Kavanagh, 815 F.2d 1034 (*Lelsz II*), *subsequent panel decision*, 824 F.2d 372 (*Lelsz III*), *cert. dismissed*, 483 U.S. 1057 (1987) 39

Marek v Chesney, 473 U.S. 1 (1985) 19

Miller v French, 530 U.S. 327 (2000) 32, 38

Miller v Whitburn, 10 F.3d 1315 (7th Cir. 1993) . . . 44

Milliken v Bradley, 433 U.S. 267 (1977) . . 17, 39, 40, 47

Mitchell v Forsyth, 472 U.S. 511 (1985) 29

Mitchell v Johnston, 701 F.2d 337 (5th Cir. 1983) . . 44

Pennhurst State School and Hosp. v Halderman, 465 U.S. 89 (1984) 8, 35, 36

Pereira v Kozlowski, 996 F.2d 723 (4th Cir. 1993) . . . 44

Pittman v Secretary, Florida Dep't of Health and Rehabilitative Services, 998 F.2d 887 (11th Cir. 1993) 44

Plyler v Evatt, 924 F.2d 1321 (4th Cir. 1991) . . . 32, 42, 43

Page

Puerto Rico Aqueduct v Metcalf & Eddy, 506 U.S. 139 (1993) 16, 29, 35, 37

Regents of the University of New Mexico v Knight, 321 F.3d 1111 (Fed. Cir. 2003) 19, 28

Roell v Withrow, 2003 U.S. Lexis 3427 (April 29, 2003) 31, 32

Rufo v Inmates of Suffolk County Jail, 502 U.S. 367 (1992) . . . . . *passim*

Schmidt v Lessard, 414 U.S. 473 (1974) 40, 41

Scott v United States Dep't. Of Justice, 920 F. Supp. 1248 (M.D. Fla. 1996) 37

Smith v Reeves, 178 U.S. 436 (1900) 28

Spallone v United States, 493 U.S. 265 (1990) 40

Sterling v Constantin, 287 U.S. 378 (1932) 33

Suter v Artist M., 503 U.S. 347(1992) 29, 37, 38

Swann v Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971) 39

Terrazas v Ramirez, 829 S.W.2d 712 (Tex. 1991) . . 30

United States v Armour, 402 U.S. 673 (1971) . . 28, 29, 38

United States v ITT Continental Baking, 420 U.S. 223 (1975) 29

Page

United States v United Shoe Machinery Corp., 391 U.S. 244 (1968) 40

Verizon Md. v Pub. Serv. Comm'n., 535 U.S. 635 (2002) . . . . . *passim*

Walker v City of Birmingham, 388 U.S. 307 (1967) . . 32

Wilder v Virginia Hospital Association, 496 U.S. 498 (1990) 2, 25, 45

Wisconsin Dept. of Corrections v Schacht, 524 U.S. 381 (1998) . . . . . *passim*

Wisconsin Hosp. Ass'n. v Reivitz, 820 F.2d 863 (7th Cir. 1987) 35

CONSTITUTIONAL PROVISIONS

Tex. Const. Art. IV, § 22 30

U.S. CONST. amend. XI . . . . . *passim*

U.S. CONST. art. VI, cl.2 . . . . . 1, 33

STATUTES

1993 TEX. GEN. LAWS, 4564 (73rd Regular Session) . . 30

1995 TEX. GEN. LAWS 5260-5261 (74th Regular Session) 30

1997 TEX. GEN. LAWS 5552 (75th Regular Session) . . . 30

Page

1999 TEX. GEN. LAWS 5467 (76th Regular Session) . . . 30

2001 TEX. GEN. LAWS 5434 (77th Regular Session) 30

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 . . . . . 2, 43

42 U.S.C. § 1396 . . . . . 43, 44

42 U.S.C. § 1396a(a) 35

42 U.S.C. § 1396a(a)(8) 13

42 U.S.C. §§ 1396a(a)(30)(A) 13

42 U.S.C. §§ 1396a(a)(43) . . . . . *passim*

42 U.S.C. §§ 1396a(a)(43)(A) . . . . . *passim*

42 U.S.C. §§ 1396a(a)(43)(B) . . . . . *passim*

42 U.S.C. §§ 1396a(a)(43)(C) . . . . . *passim*

42 U.S.C. §§ 1396d(a)(19) 47

42 U.S.C. § 1396d(r) . . . . . *passim*

42 U.S.C. § 1396d(r)(1)(B)(iii) 12

42 U.S.C. § 1396d(r)(1)(B)(iv) 12

42 U.S.C. § 1396d(r)(5) 44

42 U.S.C. § 1396n(g) 47

Page

42 U.S.C. § 1396u-2 10

42 U.S.C. § 1983 . . . . . i, 1, 4

RULES

Federal Rule of Civil Procedure 60(b) 32

Federal Rule of Civil Procedure 65(d) 40, 41

MISCELLANEOUS

J. Elliot, Debates on the Federal Constitution (2d ed. 1854) 19

Newberg on Class Actions (4th Ed. 2002) 25

The Federalist No. 81 19

Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction (2d Ed. 1992) 25, 35

OPINIONS BELOW

The court of appeals' decision is reported at 300 F.3d 530 (5th Cir. 2002) and reprinted in Appendix A to the Petition for Writ of Certiorari ("Pet. App."). The district court's decision denying the Respondent State officials' motion to dismiss (filed May 17, 2001) is reprinted in Pet. App. B. The district court's decision permitting supplementation of the complaint (filed March 12, 2001) is reprinted in Pet. App. C. The district court's memorandum opinion finding violations of the consent decree is reported at 109 F. Supp. 2d 579 (E.D. Tex. 2000). The memorandum opinion and the district court's remedial order (both filed August 14, 2000) are reprinted in Pet. App. D. The consent decree (filed February 20, 1996) is lodged with the Clerk (hereinafter "L.")

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on July 24, 2002. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution; U.S. CONST. amend. XI; 42 U.S.C. §§ 1396a(a)(43); 1396d(r) and 42 U.S.C. § 1983 are reprinted in Pet. App. E. Finally, the Supremacy Clause of the United States Constitution states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl.2.

STATEMENT OF THE CASE

The Respondent State officials ("State officials" or "officials") actively urged the district court to enter a consent decree that by its own terms 1) was "reached within the framework of federal law," 2) creates "mandatory, enforceable" obligations, and 3) specifically allows the parties to "request relief from" the federal district court if disputes arise about decree compliance. L.; ¶¶302, 303, 308. Despite urging the district court to enter the decree, the State officials now urge this Court that the Eleventh Amendment to the United States Constitution bars the district court from enforcing its properly entered consent decree.

A. The Children's Suit For EPSDT Services. The Petitioner mothers filed suit in 1993 because the officials were not providing the Petitioner children with Early and Periodic Screening, Diagnostic and Treatment services (EPSDT).[1] 42 U.S.C. §§ 1396a(a)(43); 1396d(r). The district court has jurisdiction over the dispute. 28 U.S.C. § 1331. The children seek only prospective relief from State officials sued in their official capacities. *Ex parte Young*, 209 U.S. 123 (1908).

When States accept federal Medicaid funds, they must follow federal Medicaid requirements. *Wilder v Virginia Hospital Association*, 496 U.S. 498, 502 (1990), *cited with approval in Gonzaga v Doe*, 536 U.S. 273, 280, 289 n.6 (2002). EPSDT is a required service. 42 U.S.C. §§ 1396a(a)(43); 1396d(r).

Through EPSDT, Congress created a practical approach to health care for indigent children. Medicaid officials "must . . . provide for"

- informing all Medicaid recipients under the age of 21 about EPSDT and immunizations,
- providing or arranging for screens "in all cases where they are requested," and

1. Petitioners refer to themselves as the "children" in this brief.

- "arranging for (directly or through referral to appropriate agencies, organizations, or individuals)" all necessary treatment.

42 U.S.C. §§ 1396a(a)(43); *see also*, 42 U.S.C. § 1396d(r).

Preventive screens are EPSDT's "foundation." Order Concerning Fairness of Consent Decree at 6, *quoting* Former Defendant Texas Commissioner of Health Dr. Smith ("Fairness Order"). Physicians and dentists agree that preventive care can help indigent children to avoid health problems, *id*. at 10-12, and that preventive care is a good investment. *Id*. at 12-14. As former Defendant Texas Commissioner of Health and Human Services Ladd testified, "preventive care is cost effective. '[I]t is a fact; if you spend more money . . . at an early age, you save money' later." *quoted in id*. at 12.

The children suffered because the officials did not meet their important EPSDT obligations. Many children did "not receive check-ups or other services because they [did] not understand the Medicaid system or what Medicaid covers. Defendants' past methods of informing class members about EPSDT have often been ineffective." Fairness Order at 15; *see* 42 U.S.C. § 1396a(a)(43)(A) (inform all children about EPSDT). Even though many children did not have a doctor to provide screens or other necessary health care, the State officials' "systems for assisting class members to find health care providers did not work well." Fairness Order at 14; *see also*, *Id*. at 30; 42 U.S.C. §§ 1396a(a)(43)(B) & (C) ("arrange" screens and treatment).

The State officials' breach of their EPSDT duties is all the more harmful because "indigent children are more likely to be in ill health than are their more fortunate peers." Fairness Order at 8. For example, anemia and asthma are overrepresented among poor children. *Id.* at 8-9. "[A]s with medical problems, indigent children also have more severe dental problems than other children." *Id*. at 9. Indigent children have not shared in "significant progress recently in eradicating dental disease and

decay among young people in the United States." *Id*. The consequences can be serious, including greater likelihood of "dental emergencies ('swelling, fever, bleeding, pus, pain of dental origin')." *Id*. Finally, "tooth aches and dental disease constitute one of the most — if not the most — common reasons that children miss school." *Id*.

In 1994, the district court certified the case as a class action and considered the State officials' motion to dismiss this case.[2] Although the officials argued that the Eleventh Amendment prohibited suit as to State agencies, they did not urge that the Eleventh Amendment barred prospective relief from the officials themselves. The district court denied the officials' motion to dismiss except as it applied to the State agencies. Order (filed August 10, 1994).[3]

B. After Discovery And Lengthy Negotiations, The Parties Propose The Consent Decree. After extensive discovery, the parties hoped to settle this case. In October 1994, they together proposed a schedule for negotiations. The children and the State officials agreed that all were "negotiating in good faith and that negotiations may resolve this dispute *in a mutually beneficial manner*." Joint Motion Concerning Scheduling at 1 (filed October 14, 1994) (emphasis added). The district court ordered the agreed schedule.

Negotiations were serious, at arm's length, fair and open. Fairness Hearing Transcript 7;2-16 (Petitioner's counsel) ("Fairness TR").[4] As Respondents' counsel explained, "we have

2. The officials filed their motion to dismiss twice, on November 3, 1993 and April 1, 1994.

3. The district court rejected the officials' claim that three of them were not proper *Ex parte Young* defendants because they had little authority to create policy. The court further held that the Medicaid Act's EPSDT provisions create rights that can be enforced through 42 U.S.C. § 1983.

4. When the children quote from the Fairness TR, the page citation(s) precedes the semicolon. The line citation(s) follows the semicolon.

spent several days . . . every week, face to face with very difficult and honest negotiations." *Id*. 13;5-7; *see also*, *Id*. 12;16-19; *Id*. 115;19 to 116;7 (Former Defendant Dr. Koops, Associate Commissioner for Health Care Delivery, Texas Department of Health, in agreement); *Id*. 125;17-21. (Mr. Schmidt, Texas EPSDT Director, in agreement). According to Dr. Koops, all parties "believed in" the negotiations. *Id*. 116;4-5.

In January 1995, after "extensive settlement negotiations," the parties proposed an initial settlement to the district court. Joint Report Concerning the Progress of Settlement Negotiations at 1 (filed January 20, 1995) ("Joint Report Concerning Negotiations"). They reported that the "proposal fairly resolves most of the disputed issues in this case" and listed the issues that remained in dispute. *Id*. at 2-3.

The State officials wished to "inform appropriate legislative and executive offices of the state of the content and potential financial implications of this agreement. The Defendants [did] not feel that they [could] give their final approval until this discussion [took] place." So, the parties requested permission to file a proposed consent decree by June 1, 1995. *Id*. at 4. Later, the parties requested an additional month to continue work on the proposed consent decree, "since the Texas Legislature does not adjourn until May 29, 1995, and the Parties will need some time to assess the result of the legislature's action." Joint Motion to Amend Proposed Settlement Agreement and Notice to Court of Compliance at 1 (filed March 31, 1995).

Negotiations continued for several more months. The State officials had time to obtain approval from the elected officials. They also had time to reconsider the settlement to be sure that it reflected their discretion and judgment. As a result, the parties agreed to changes to the proposed settlement. *Id*. at 1; Fairness Order at 21 ("some differences" between the proposed consent decree and the earlier settlement agreement).

In July 1995, the parties made a final proposal to the district court to settle most issues presented by this litigation. They also noted that disputed issues remained. Joint Report to the Court at 1-2 (filed July 3, 1995).

C. The District Court Approves The Consent Decree, As Urged By The Texas Attorney General. In December 1995, the district court held a day long hearing to decide whether to adopt the proposed settlement as the court's decree. The Texas Attorney General was "delighted" to attend and recommended "that the Court sign this proposed consent decree." Fairness TR 12;16-17 (Opening Argument of Texas Assistant Attorney General Horne).[5] He noted that the decree was negotiated within the framework of federal Medicaid law. *Id.* 13;16-17; *see also*, L.; ¶308. All three of the State officials' witnesses testified in favor of entry of the decree. *Id*. 112-121 (Dr. Koops); *Id.* 122-138 (Mr. Schmidt); *Id.* 138-154 (Ms. Metterauer, EPSDT Director, Southeast Texas).

The district court requested proposed findings of fact and conclusions of law. *Id.* 154;19-20. In their December 26, 1995 response, the officials only objected to specific language that the children proposed for the district court's order. The officials did not object to the district court's ongoing jurisdiction over them or the decree.

In February 1996, the district court entered the settlement as its consent decree. Order to Correct Consent Decree (filed March 11, 1996). The court found that the proposed settlement was "fair, reasonable and adequate." Fairness Order at 1. Fraud and collusion were absent from the negotiations. *Id*. at 22-23. Finally, after reviewing considerable evidence and legal arguments, the district court concluded that it was likely that the "Plaintiffs could have succeeded at trial." *Id*. at 25.[6]

5. Assistant Attorney General Horne was one of the State officials' negotiators. Fairness Order at 21-22.

6. The district court accepted as true all uncontested facts stated in the consent decree. Fairness Order at 4. The facts were supported by testimony. *Id*; Fairness TR27;4-10 (Dr. Moore).

D. The State Officials' Actions After Entry Of The Decree Demonstrate Their Continued Assent To The Order And The District Court's Jurisdiction Over Them.

The officials did not appeal.

Although the officials violated many aspects of the decree, they made some efforts to comply. From July 1996 though May 2002, the State officials reported twenty five times to the district court about their efforts to comply with the decree. L.; ¶¶306-307.[7]

The parties filed three joint motions to modify the decree.[8] Other than the agreed motions, the officials did not file a motion to modify or dissolve the consent decree.[9]

E. The Children's Motion To Enforce The Consent Decree. In the fall of 1998, the children moved to enforce provisions of the consent decree. The officials "readily" admitted to the district court that "some portions of the Decree directly relate to the Federal statutory scheme for the EPSDT program. . . ." Defendants' Post-Trial Brief and Proposed Findings of Fact at 5 (filed May 31, 2000). They conceded that EPSDT "entitlements can be enforced by Federal Courts who

7. The officials filed their reports on 1) May 13, 1996 (as allowed by the district court), 2) July 26, 1996, 3) October 25, 1996, 4) February 3, 1997, 5) May 19, 1997, 6) July 31, 1997, 7) November 17, 1997, 8) February 11, 1998, 9) May 11, 1998, 10) August 13, 1998, 11) November 30, 1998, 12) February 26, 1999, 13) May 17, 1999, 14) August 16, 1999, 15) November 12, 1999, 16) April 28, 2000 (for January), 17) April 28, 2000 (for April), 18) August 14, 2000, 19) November 20, 2000, 20) February 7, 2001, 21) May 17, 2001, 22) August 3, 2001, 23) November 16, 2001, 24) February 19, 2002, and 25) May 24, 2002.

8. Joint Motion for Approval of Agreement to Increase Reimbursement for Meals (filed March 31, 1997); First Joint Motion to Modify Paragraph 35 of the Consent Decree: Schedule for Medical Check Ups (filed January 31, 2000). Joint Motion to Modify Paragraph 19 of Consent Decree (filed October 18, 2000) (concerning outreach). The district court granted the motions.

9. The court of appeals incorrectly found that the district court refused to modify the consent decree. Pet. App. at 3a.

have authority to prospectively enjoin State officials for violating those rights." *Id*. at 11; *see* Pet. App. 247a-248a.

Nonetheless, the officials argued that the Eleventh Amendment barred the district court from enforcing the decree provisions raised in the children's motion. They argued that "the Court has jurisdiction to impose a remedy only when it finds that class members' federal rights have been violated by a defendant's failure to properly implement a provision of the consent decree." Defendants' Pre-Trial Brief at 3 (filed March 9, 2000); *citing Lelsz v Kavanagh*, 807 F.2d 1243, 1252 (5th Cir. 1987) (*Lelsz I*), *reh'g en banc denied*, 815 F.2d 1034 (*Lelsz II*), *subsequent panel decision*, 824 F.2d 372 (*Lelsz III*), *cert. dismissed*, 483 U.S. 1057 (1987).

F. The District Court's Memorandum Opinion And Remedial Order To Enforce The Consent Decree. Following full briefing and a five-day hearing in March 2000, the district court issued its memorandum opinion and remedial order. Pet. App. 54a; 276a.

1. Jurisdiction To Enforce The Decree. The district court decided that it had jurisdiction to enforce the decree despite the officials' sovereign immunity claims. Pet. App. 245a-275a. First, the court concluded that this case falls within the *Ex parte Young* exception to the Eleventh Amendment because it seeks prospective relief from State officials' violation of federal law. Pet. App. 246a n.197. Second, the district court noted that the State officials did not object to the entry of the consent decree. Pet. App. 247a.

Third, the district court addressed the court of appeals' decision in *Lelsz*, which concludes that the Eleventh Amendment prevents enforcement of a consent decree based on State law. 807 F.2d 1243, 1247, *citing Pennhurst State School and Hosp. v Halderman*, 465 U.S. 89 (1984). The district court decided that *Lelsz* does not bar enforcement of the decree in this case because the consent decree is not based on state law. Pet. App. 260a.

Since "the decree provisions at issue bear a clear relationship to federal law," *id.*, the district court referred to *Rufo v Inmates of Suffolk County Jail*, 502 U.S. 367 (1992) instead of *Lelsz*. Pet. App. 256a n.199. *Rufo* envisions "the enforcement of a decree that includes more than the mere recitation of federal law, as 'almost any affirmative decree beyond a directive to obey [federal law] necessarily does that.'" Pet. App. 256a n.199, *quoting Rufo*, 502 U.S. at 389.

To determine that it had jurisdiction to enforce the consent decree provisions at issue, the district court applied this Court's analysis in *Firefighters v City of Cleveland*, 478 U.S. 501, 519-525 (1986). *Firefighters* establishes a three-pronged test for whether a consent decree may be entered:

> [T]o sustain federal court jurisdiction to approve a consent decree against state officials, the remedies in the decree must only serve to: 1) resolve a dispute within the court's subject matter jurisdiction, 2) come within the general scope of the case made by the pleadings, and 3) further the objectives of the law upon which the complaint was based.

Pet. App. 247a, *citing*, *Firefighters*, 478 U.S. at 525.

Since "each provision falls squarely within the parameters outlined in *Firefighters*," the district court concluded that the provisions "may be enforced against defendants." Pet. App. 261a. First, the court found that it could enforce the decree's requirement for effective outreach. L.; ¶¶32, 52. "Decree provisions which obligate defendants to inform 'effectively' . . . further the objectives of " the statutory requirement that the State officials inform all of the children about EPSDT. Pet. App. 264a. The State officials must inform all Medicaid recipients under the age of 21 "of the availability of early and periodic screening, diagnostic and treatment services . . . and the need for age-appropriate immunizations against vaccine-preventable diseases." 42 U.S.C. § 1396a(a)(43)(A).

After reviewing evidence of the problems that the children face obtaining medical screens, the court found that it could enforce the decree's requirements concerning check ups. The "defendants may be held in violation of decree requirements regarding the provision of services upon request where they have failed to provide class members with the information necessary to make such requests." Pet. App. 266a. The court also concluded that it could enforce requirements for dental services and case management. *Id.* L.; ¶2, 3, 143, 212, 248, 264, 281.

Third, the court found that it could enforce the decree's managed care requirements concerning check ups and treatment. L.; ¶¶190, 192. The State officials' managed care program uses several financing models to control the children's access to health care. Through health maintenance and similar organizations (HMOs), the State officials require the children to receive care through one primary care provider, who may treat them directly or approve referrals to a limited networks of specialists. Pet. App. at 130a-131a.

Decree provisions about services in managed care appropriately give "special emphasis to [the children's] entitlements in light of the potential problems posed by the implementation of managed care." Pet. App. 267a-268a. Although federal law permits the officials to implement managed care, 42 U.S.C. § 1396u-2, the officials must "utilize managed care to meet their obligations under the federal EPSDT statute; . . . [The Medicaid Act's managed care provisions do] not free them from those obligations, or limit their responsibilities to managed care enrollees." Pet. App. 267a.

The court concluded that it could require the officials to provide data and reports required by the decree. L.; ¶¶191, 273-280, 284, 289, 293, 295. "[T]he collection of data furthers the objectives of the EPSDT statute, which is to improve the health of poor children. That objective cannot be accomplished without constant and rigorous review of the program's accomplishments and shortcomings." Pet. App. 270a-271a.

The district court enforced the decree's requirements for training of professionals because of the demonstrated "causal connection between the increased knowledge of providers and other personnel and the access to and receipt of services by the plaintiff class." Pet. App. 274a. L.; ¶¶104, 107-108, 112-114, 117-120, 124-130, 194.

Finally, the district court enforced the decree's requirements for toll-free numbers, which are part of the officials' efforts to inform the children about EPSDT and to "provide or arrange" screens and other services for them. 42 U.S.C. §§ 1396a(a)(43)(A); (B); (C). Pet. App. 274a. L.; ¶247.

2. State Officials Violated The Decree. The memorandum opinion also concludes that the State officials were violating most of the decree provisions cited by the children. The record is filled with examples of children who could not obtain required EPSDT services. A two-year old with cerebral palsy could not even hold his head up — let alone walk — because he did not receive proper physical therapy. Pet. App. 163a-164a (Nurse Lloyd). A seven-year old was about to be placed in special education because — for want of a hearing test to diagnose his deafness — he was incorrectly perceived to have learning disabilities. Pet. App. 88a n.32; Decree Enforcement Hearing Transcript II-171;4 to 172;22 ("Enforcement TR") (Nurse Singleton).[10]

Other evidence also shows that the decree was violated. Even though officials have expanded their outreach efforts, their information program still falls short. Pet. App. 59a-83a. Although the children are entitled to information about EPSDT, 42 U.S.C. § 1396a(a)(43)(A), "[o]verwhelming evidence . . . demonstrat[es] that large numbers of class members" lack information about the program. Pet. App. 61a. Further, "a poor and often isolated population should not be robbed of their rights

10. When the children refer to the Enforcement TR, they refer to the volume number by Roman numeral. The page citation(s) precedes the semicolon. The line citation(s) follows the semicolon.

to services upon request when they have not been informed of those rights." Pet. App. 111a; 42 U.S.C. § 1396a(a)(43)(B) (screens).

Despite the officials' claims that their managed care program would improve the children's access to high quality health care, Pet. App. 133a, the reverse has been the case. Fewer children even get basic medical screens in managed care than without it. Pet. App. 139a-141a. Even when children get screens in managed care, those screens are often "grossly inadequate and incomplete." Pet. App. 141a. For example, young children in managed care frequently lack immunizations or blood tests for lead poisoning, even though "Congress has recognized the importance of immunizations and blood tests for lead poisoning by requiring that they be mandatory checkup elements." Pet. App. 142a n.86, *see also*, *id*. 142a-143a; 42 U.S.C. §§ 1396d(r)(1)(B)(iii) (immunizations); 1396d(r)(1)(B)(iv) (lead tests).

Managed care raises significant barriers that prevent the children from receiving medical treatment that they need. Pet. App. 144a-160a. For example, one youth had to wait eight weeks for orthopedic care for a broken arm. Pet. App. 149a n.98, Enforcement TR II-199;4-16 (Nurse Singleton). Children in managed care cannot get even emergency care for severe and prolonged asthma attacks of a critical nature, or dangerous episodes of vomiting and fever that result in dehydration requiring intravenous fluids. Pet. App. 157a-158a (C.H., mother of three class members).

Finally, despite improvements — including increased rates of dental screens — more than one million children still get no dental care at all. Pet. App. 92a. As a result, children "crowd emergency rooms in hospitals, suffering from acute forms of dental disease that, while easily preventable, often lead to such health complications as serious oral infections, dehydration, fever and malnourishment stemming from the inability to eat." Pet. App. 91a.

G. The District Court's Forward-Looking Remedial Order Accommodates The Officials' Exercise Of Discretion. The district court chose a mild remedial approach to the decree violations. The court accommodated the officials' discretion by allowing them to propose "corrective action plans to remedy each violation of the decree." Pet. App. 276a-277a. As with the decree itself, the district court's remedial order provides only prospective relief.

The officials appealed.[11]

H. The Court Of Appeals' Decision. Although the Fifth Circuit noted that the record shows "unmet medical needs of children in Texas," Pet. App. 3a, the court found that the Eleventh Amendment deprived the district court of jurisdiction to enforce the decree. Pet. App. 13a *et seq*. On July 24, 2002, the court of appeals vacated the district court's orders and remanded for further proceedings. Pet. App. 46a.

1. According To The Fifth Circuit, The Officials Did Not Waive The Eleventh Amendment. The court of appeals held that the State officials did not waive Eleventh Amendment immunity by urging the district court to enter the consent decree. Pet. App. 39a-42a. The State officials did not unequivocally waive sovereign immunity because 1) the decree "states in paragraph 301 that 'Defendants do not concede liability;'" *id.* at 41a, 2) before and after asking the district court to enter the consent decree, the officials raised the Eleventh Amendment, and 3) the officials are defendants in this case, not plaintiffs.

---

11. A second interlocutory appeal before the court of appeals concerned the children's first supplemental complaint. It asserts two new claims about the officials' failure to provide dental care as required by the Medicaid Act. 42 U.S.C. §§ 1396a(a)(8); 1396a(a)(30)(A). After supplementing the complaint, Pet. App. 52a, the district court denied the officials' motion to dismiss. Pet. App. 48a. The court of appeals vacated the denial of the motion to dismiss. Pet. App. 46a.

2. According To The Court Of Appeals, A Consent Decree Can Be Enforced Only If A Decree Violation Is Also A Violation Of Federal Rights. The Fifth Circuit relied on its controversial *Lelsz* decision instead of applying the *Rufo/ Firefighters* test to determine whether the decree could be enforced. Pet. App. 24a-27a; *see Rufo*, 502 U.S. at 389-390; *Firefighters*, 478 U.S. at 525. The court extended *Lelsz*' reasoning to hold that the Eleventh Amendment bars enforcement of a consent decree against State officials even if the decree is based on federal law. The Eleventh Amendment requires the district court to "'fall back on its inherent jurisdiction'" to enforce a consent decree against State officials. Pet. App. 24a. "Before the district court can remedy a violation . . . of the consent decree, plaintiffs must demonstrate that any such consent decree violation is also a violation of a federal right." Pet. App. 27a-28a.

This Court granted the children's petition for a writ of certiorari on March 10, 2003.

SUMMARY OF ARGUMENT

The Eleventh Amendment cannot mean that State officials may urge a federal court to enter a consent decree based on federal law and later urge that sovereign immunity bars enforcement of the order that they urged the court to enter. If given this meaning, the Eleventh Amendment and sovereign immunity would be trivialized, the judiciary's integrity would be impugned and unfairness would result.

When State officials waive immunity by agreeing to a consent decree, they must not be allowed to later urge that the very same immunity bars the district court from enforcing the agreed decree. The Eleventh Amendment does not bar a court from "administering relief" when the court is "acting in a matter ancillary to a decree rendered in a cause over which it had jurisdiction." *Gunter v Atlantic Coast Line R. Co.*, 200 U.S. 273, 292 (1906). This is particularly true when, as in this case, the decree 1) is based on federal law, 2) creates "mandatory,

enforceable" obligations and 3) allows a return to court to resolve disputes about decree compliance. It would be anomalous, inconsistent and unfair for State officials "both (1) to invoke federal jurisdiction, thereby contending that the 'Judicial power of the United States' extends to the case at hand, and (2) to claim Eleventh Amendment immunity, thereby denying that the 'Judicial power of the United States' extends to the case at hand." *Lapides v Bd. of Regents of Univ. System*, 535 U.S. 613, 619 (2002).

If it is solely up to State officials whether to comply with agreed decrees, there will be no incentive for plaintiffs to agree. Plaintiffs and State officials will lose the option to choose consent decrees — a remedy which is available to all other litigants.

The ability to waive immunity is an important aspect of sovereignty. The sovereign's personal privilege to waive immunity predates our nation's founding and has continued unabated until the present. *Alden v Maine*, 527 U.S. 706, 715-716, 724 (1999).

When properly authorized State officials voluntarily choose to enter into a consent decree, they waive sovereign immunity by invoking the federal court's jurisdiction. This happened in this case because the State officials' conduct was active, voluntary, clear and authorized. *See*, *Lapides*, 535 U.S. at 620-624.

It is important for State officials to be able to waive sovereign immunity to enter into consent decrees. Eleventh Amendment sovereign immunity is designed to protect the States' dignity and ability to make independent decisions concerning policy and the administration of their own affairs. Being able to enter into consent decrees protects the States' dignity by letting them choose to avoid the spectacle of trial. Since State officials incorporate their discretion into agreed consent decrees, consent decrees give those officials a degree of control over how to comply with federal law and how to

administer important programs. Finally, consent decrees grant to State officials the flexibility to agree to resolve parts of a case even if they cannot agree to resolve the entire dispute.

It would impugn the federal court's integrity if the court of appeals' rule becomes the law of the land. Federal courts should not be put in the awkward position of expending time and effort to decide whether to approve and enter consent decrees, only to face the State officials' claim that sovereign immunity prevents enforcement. The district courts should not have to make difficult jurisdictional rulings every time a party seeks to enforce a consent decree against State officials.

State officials must not have free rein to ignore validly entered orders. A court needs to be able to enforce its own orders so it can "function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees." *Kokkonen v Guardian Life Ins.*, 511 U.S. 375, 380 (1994). Even federal injunctions that are subject to substantial constitutional question must be obeyed unless modified or dissolved.

Second, even if the officials did not waive sovereign immunity, the district court had jurisdiction to enforce the consent decree because of the *Ex parte Young* exception to the Eleventh Amendment. *Ex parte Young* is critical to our constitutional design because "[r]emedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." *Green v Mansour*, 474 U.S. 64, 68 (1985).

This is a classic *Ex parte Young* case because the children's "complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md. v Pub. Serv. Comm'n*., 535 U.S. 635, 645 (2002). The Eleventh Amendment does not bar enforcement of the consent decree in this case because "*Young* and its progeny render the Amendment wholly inapplicable to a certain class of suits." *Puerto Rico Aqueduct v Metcalf & Eddy*, 506 U.S. 139, 146 (1993).

The Eleventh Amendment permits consent decree enforcement against State officials whether or not their violation of the decree also violates a federal right. First, when a federal court has subject matter jurisdiction over claims, Eleventh Amendment analysis does not inquire into the merits of the case or whether rights have been violated. *Verizon*, 535 U.S. at 642-643, 645-646. Second, it would unduly restrict federal courts' proper equitable powers to prohibit enforcement of decrees unless violation of the decree is the same as violation of a right. "[T]o save themselves the time, expense and inevitable risk of litigation, . . . [State officials] could settle the dispute . . . by undertaking to do more than [federal law] itself requires." *Rufo*, 502 U.S. at 389 (*quotation omitted*). Third, consent decrees by their very nature further the important goal of respecting State officials' discretion, as is required when federal courts craft injunctions by court order instead of by agreement. *Milliken v Bradley*, 433 U.S. 267, 280-281 (1977). It does not make sense for federal courts to lack jurisdiction to enforce consent decrees, which already incorporate State officials' exercise of discretion. It especially does not make sense in this case, because — by requesting the officials' remedial proposals — the district court took extra efforts to respect the State officials' judgment about how to come into compliance with the decree.

It would be contrary to principles of sound judicial administration to require plaintiffs to prove that violation of a consent decree also violates a federal right before a decree can be enforced. Settlement favors both plaintiffs and defendants — as well as courts that need not proceed to trial. But, the court of appeals' rule means that plaintiffs have to prove their case on the merits — that their rights have been violated — to enforce a consent decree. This rule removes any incentive for plaintiffs to agree to consent decrees in cases that involve State official-defendants. If plaintiffs will not agree, State officials will lose the remedial option of consent decrees. More cases will go to trial, and federal courts will be forced to intrude more into the

affairs of States than they would if consent decrees were a practical option for resolving these complex disputes.

There is a better way. If a federal court can properly enter a consent decree urged by State officials, it should also be able to enforce that decree. To be properly entered, a consent decree "must (1) 'spring from and serve to resolve a dispute within the court's subject matter jurisdiction'; (2) 'come within the general scope of the case made by the pleadings'; and (3) 'further the objectives of the law upon which the complaint was based.'" *Firefighters*, 478 U.S. at 525.[12] The decree in this case — which the State officials helped to craft — complies with the three *Firefighters* elements. The district court was correct to enforce it in the face of the officials' serious decree violations.

ARGUMENT

I. WHEN STATE OFFICIALS ACTIVELY URGE A FEDERAL COURT TO ENTER A CONSENT DECREE THAT 1) SPECIFICALLY PROVIDES FOR THE FEDERAL COURT'S ONGOING SUPERVISION OF DECREE COMPLIANCE AND 2) BY ITS OWN TERMS CREATES "MANDATORY, ENFORCEABLE" OBLIGATIONS, THEY WAIVE SOVEREIGN IMMUNITY FROM DECREE ENFORCEMENT.

For centuries, the sovereign has been able to consent to suit. The sovereign's immunity from suit "*without its consent*" was "well established in English law" and "universal in the States when the Constitution was . . . ratified." *Alden*, 527 U.S. at 715-716 (emphasis added).

Throughout their debates, the founders noted that our new nation would maintain the doctrine of sovereign immunity, including the sovereign's age-old ability to consent to suit. *Alden*, 527 U.S. at 716-718. As Alexander Hamilton stated, "[i]t is inherent in the nature of sovereignty not to be amenable

12. *Firefighters'* first factor assures that federal courts only enter decrees in cases where subject matter jurisdiction exists. As a result, federal courts will also only enforce consent decrees in cases where jurisdiction is proper.

to the suit of an individual *without its consent*." The Federalist No. 81 at 487-488, *quoted in Alden*, 527 U.S. at 716 (emphasis in The Federalist original). James Madison "echoed" the same point. *Id*. at 717. If a citizen files suit in federal court "and *if a state should condescend to be a party*, [a federal] court may take cognizance of it." 3 J. Elliot, Debates on the Federal Constitution 533 (2d ed. 1854), *quoted in Alden*, 527 U.S. at 717 (emphasis added).

In *Hans v Louisiana*, this Court once again recognized that "[*u*]*ndoubtedly a State may be sued by its own consent.*" 134 U.S. 1, 17 (1890) (emphasis added). "The suability of a State *without its consent* was a thing unknown to the law." *Id.* at 16 (emphasis added). Indeed, "[t]he immunity from suit belonging to a State . . . is a *personal privilege which it may waive at pleasure*." *Clark v Barnard*, 108 U.S. 436, 447 (1883) (emphasis added). In sum, this Court "ha[s] not questioned the general proposition that *a State may waive its sovereign immunity*." *Alden*, 527 U.S. at 737 (emphasis added).

It is important for State officials to be able to waive immunity to agree to consent decrees. "[S]ettlements rather than litigation will serve the interests of plaintiffs *as well as defendants*." *Evans v Jeff D.*, 475 U.S. 717, 733 (1986), *quoting Marek v Chesney*, 473 U.S. 1, 10 (1985) (emphasis added). State officials must be able to waive immunity to settle litigation or else they would "be deprived of the opportunity to avoid 'an expensive and protracted contest and the possibility of an adverse and disruptive adjudication.'" *Lawyer v Dep't. of Justice*, 521 U.S. 567, 574 (1997).[13]

13. State officials may waive immunity from one part of litigation. For example, their litigation conduct may waive immunity from compulsory counterclaims even if it does not waive immunity from other possible counterclaims. *Regents of the University of New Mexico v Knight*, 321 F.3d 1111, 1125-1126 (Fed. Cir. 2003).

In the context of settlement, this flexibility is important to preserve State officials' ability to exercise discretion. They should be able to waive

(Cont'd)

Immunity is designed to protect the States' dignity. *Alden*, 527 U.S. at 714-715. Immunity must not be misinterpreted to require a State to submit to the indignity of trial and possibly being found in violation of federal law when the State itself prefers to avoid this spectacle. In addition, immunity should not prevent a State from choosing to avoid the expense of trial, in terms of dollars, time and risk.

Further, sovereign immunity is designed to protect the States' ability to make independent decisions concerning policy and the administration of their own affairs. *Alden*, 527 U.S. at 713. The decision to settle "institutional reform" litigation by consent decree is in itself an important policy decision; it permits State officials to infuse the agreed decree with their judgment about how to administer an important program. It also gives them a degree of control over the terms of the remedy and permits them to avoid the unpredictable results of a judicially crafted injunction if the plaintiffs prevail. The Eleventh Amendment must not be misinterpreted to deprive State officials of the option to make this policy choice.

Moreover, the process of negotiation allows the officials time to consult with other important State policy-makers before reaching a final agreement, so the State's internal decision-making process is respected. In this case, the officials had many months to consult with members of the legislature and other officials before finalizing the decree. The process of trial and a judicially created remedy is not so accommodating.

(Cont'd)

immunity to agree to an enforceable consent decree that resolves parts of a case while leaving other parts of the case in dispute. In fact, this is exactly what happened in this case. Joint Report to the Court at 1-2 (reserving disputed issues).

A. State Officials Waive Sovereign Immunity From Decree Enforcement By Voluntary, Clear Litigation Acts That Invoke The Court's Jurisdiction. Litigation conduct may waive Eleventh Amendment immunity. In *Gardner v State of New Jersey*, 329 U.S. 565 (1947), New Jersey filed a proof of claim to recover taxes from a bankrupt railroad. Later, the State's Attorney General urged that sovereign immunity barred the bankruptcy court from hearing objections to the claim. Immunity was no bar because it had been waived. "When the State becomes the actor . . . it waives any immunity it otherwise might have had respecting the adjudication." *Id*. at 574; *see also*, *College Sav. v Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675-676 (1999); *Clark*, 108 U.S. at 447.

More recently, this Court decided that the act of removal to federal court waives sovereign immunity, even from claims made only under State law. In *Lapides*, 535 U.S. 613, Professor Lapides filed suit in a Georgia state court against the Georgia State University System and university officials. All of the defendants, including the State University, removed the case to federal court. The clear and voluntary act of removal waived the State's claim of sovereign immunity because it "invoked the federal court's jurisdiction." *Id*. at 620.

Further, when a State waives immunity by litigation conduct, it cannot change its mind later. *Lapides*, 535 U.S. at 619. "This is the situation in which law usually says a party must accept the consequences of its own acts." *Wisconsin Dept. of Corrections v Schacht*, 524 U.S. 381, 393 (1998) (Kennedy, J., concurring). For example, in *Gunter*, a federal court enjoined South Carolina officials from taxing railroad property. 200 U.S. 273, 282, 291 (1906). Although the State officials did not claim immunity from the original proceedings, *id*. at 287-289, they later claimed that the Eleventh Amendment barred the court from enjoining them from taxing. *Id*. at 291. Their argument failed because once a State waives immunity, "it will be bound

thereby and cannot escape the result of its own voluntary act by invoking the prohibitions of the Eleventh Amendment." *Id*. at 284.

B. In This Case, Litigation Conduct Waived Sovereign Immunity As To Decree Enforcement. Four factors determine whether litigation conduct waives sovereign immunity. The first three factors are whether State officials 1) take active steps to invoke federal jurisdiction, thereby waiving sovereign immunity, *Lapides*, 535 U.S. at 620; *Gardner*, 329 U.S. at 574, 2) voluntarily waive immunity, *Clark*, 108 U.S. at 447, and 3) take actions that clearly invoke federal jurisdiction, thereby waiving immunity, *Lapides*, 535 U.S. at 620. The fourth factor is whether there is proper authority to waive immunity. *Id*. at 621-623. Each factor is present in this case.

1. The Officials Actively Pursued The Decree. The consent decree was a long time coming. Over the course of many months, the State officials' actions demonstrated their active consent to the decree and the district court's jurisdiction over them *vis a vis* decree compliance. By becoming "actor[s, State officials waive] any immunity [they] otherwise might have had respecting" the consent decree. *Gardner*, 329 U.S. at 574.

Even the decision to begin negotiations actively involved the officials. In October 1994, the children and the State officials together urged the district court to permit settlement negotiations.

Negotiations were serious, at arm's length, fair, open and honest. Fairness TR 7;2-16; *id*. 13; 5-7; *see also*, *id*. 12;16-19; *id*. 115;19 to 116;7 (Dr. Koops, in agreement); *id*. 125;17-21. (Mr. Schmidt, in agreement). All parties, including the officials, "believed in" the negotiations. *Id*. 116; 4-5 (Dr. Koops).

The parties together proposed to the court an initial settlement in January 1995. The State officials could not finally propose a settlement then, however, because they believed that they needed approval from various State legislators and officials.

Joint Report Concerning Negotiations at 4. Later, the parties even requested an enlargement of the deadline for negotiations so that they would have time to review relevant legislative action after the session ended.

After approval had been obtained and several revisions to the proposed settlement had been made, the parties proposed the consent decree to the district court in July 1995. The proposal stated that "the parties may request relief from this Court" from decree violations. L.; ¶303. The parties and their lawyers all ". . . hope[d] that the Court will sign the Decree. . . ." Joint Report to the Court at 1.

In December 1995, the Attorney General recommended "that the Court sign this proposed consent decree." Fairness TR 12;17 (opening statement of Assistant Attorney General). The State officials' witnesses all testified in favor of the decree. *Id*. 112-121 (Dr. Koops); *Id*. 122-138 (Mr. Schmidt); *id*. 138-154 (Ms. Metterauer).

The district court waited to enter the decree as its order until February 1996 — more than fifteen months after negotiations had begun in 1994. The State officials had enough time to thoughtfully and carefully determine whether or not to agree to the consent decree.

The officials chose the decree. Without their active involvement, the decree never would have been before the district court. "By electing to . . . [urge entry of the decree, the officials] . . . created the difficult problem confronted in the Court of Appeals and now here." *See Schacht*, 524 U.S. at 393 (Kennedy, J., concurring).[14]

---

14. Before negotiations began and settlement was reached, the officials defended against the claims raised in this case. For example, they filed their motion to dismiss twice.

After the parties agreed to the consent decree, the officials' actions changed. Their actions are further evidence that the officials consented to the decree.

(Cont'd)

2. Waiver Was Voluntary. By voluntarily invoking the district court's jurisdiction, the State officials waived any immunity from decree enforcement that they may have had. "[T]he *voluntary nature* of a consent decree is its *most fundamental characteristic*." *Firefighters*, 478 U.S. at 521-522 (emphasis added).

Since the "parties' consent animates the legal force of a consent decree," *id*. at 525, the State officials were "under no compulsion" even to negotiate with the children. *See Schacht*, 524 U.S. at 395-396 (Kennedy, J., concurring.). Once negotiations began, the officials had the "unilateral right to block" the agreement that resulted in the decree. *Id*.

Instead of blocking the agreement, the officials embraced it. During the district court's hearing to decide whether to adopt the decree, the Assistant Attorney General who participated in settlement negotiations was "delighted to be here today," and recommended "that the Court sign this proposed consent decree." Fairness TR12; 16-17; Fairness Order at 1.

Further, the State officials had other options. At the most Draconian extreme, they could have urged that Texas decline federal Medicaid funds, so that there would have been no need

---

(Cont'd)

After the hearing to determine if the proposed consent decree should be entered, the officials ignored another opportunity to raise Eleventh Amendment concerns. In response to the district court's request for proposed findings of fact and conclusions of law, the officials did not object to the district court's ongoing jurisdiction over them or the decree.

The officials did not appeal from the order that adopted the consent decree, as would have been expected if they had disagreed with the decree's entry. In addition, from July 1996 though May 2002, the State officials reported twenty five times to the district court about their efforts to comply with the decree. L.; ¶¶306-307.

Finally, the parties filed three joint motions to modify the decree, further indicating that the State officials assented to the district court's ongoing jurisdiction over them and the decree.

to comply with federal requirements. *Wilder*, 496 U.S. at 502; *cited with approval in Gonzaga*, 536 U.S. at 280, 289 n.6.

The officials had other litigation options available to them. They could have opted for trial instead of settlement. *Lawyer*, 521 U.S. at 580. They could have agreed to the decree under protest, by "express agreement reserving the right to appeal." *See*, 15A Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 3902 at 95 (2d Ed. 1992). Or they could have attempted to reach a settlement contract instead of an enforceable consent decree. If this case had been disposed of by a settlement agreement and a dismissal order that did not retain the district court's ongoing jurisdiction over the case, we might not be here today. *See Kokkonen*, 511 U.S. at 381-382.

The officials did not choose any of these routes. They chose to invoke the federal court's jurisdiction by urging entry of the decree. What did they obtain in exchange for the decree and its waiver of sovereign immunity? They avoided trial and a finding of liability, and maintained the ability to seek waivers of Medicaid requirements. L.; ¶¶ 301, 308. They obtained a consent decree that incorporates their judgment about how to administer EPSDT. They avoided an injunction crafted by a district court that might not share their experience with health care for indigent children or their views about program administration. Finally, they obtained an order that protects them from further suit by other class members concerning the same issues because "[a]ll members of the class . . . are bound by the judgment." 5 Newberg on Class Actions § 16.20 at 226 (4th Ed. 2002).

a. State officials can voluntarily waive immunity even though they are defendants. State officials can waive Eleventh Amendment immunity even if they are defendants. *Gunter*, 200 U.S. at 289, 292. Even though the State of Georgia was involuntarily brought into a case as a defendant, it consented to suit in federal court by agreeing to removal. *Lapides*, 535 U.S. at 620. The State officials' mere status as defendants does not

defeat their voluntary invocation of the federal court's jurisdiction, which waived the Eleventh Amendment.

b. The officials' assertion of sovereign immunity before or after they waived it does not defeat their waiver of the Eleventh Amendment's protections as to decree enforcement. The State officials' pursuit of decree entry waived sovereign immunity even though they "repeatedly raised in the district court an Eleventh Amendment defense to the enforcement of the decree." Pet. App. 41a. Indeed, the officials' earlier assertion of the Eleventh Amendment actually shows that the officials and their lawyer knew about the concept of sovereign immunity. They argued that the Eleventh Amendment barred pursuit of this case as to the State agency defendants. Even though they knew that immunity existed, the officials waived it with regard to the decree and its enforcement. Their waiver was knowing and voluntary. *See College Sav*., 527 U.S. at 682, *citing Johnson v Zerbst*, 304 U.S. 458, 464 (1938).

In *Lapides*, as here, the State defendant sought the Eleventh Amendment protection that it had earlier disavowed. 535 U.S. at 616. *Lapides* rightly prohibited the defendant from reasserting the Eleventh Amendment immunity that it already had waived. The children urge the Court to follow *Lapides*' reasoning in this case.

3. Waiver Was Clear And Unequivocal. To invoke federal jurisdiction and waive immunity, litigation conduct must be "clear." *Lapides*, 535 U.S. at 620. The officials' conduct in this case is unequivocal. *See Schacht*, 524 U.S. at 397 (Kennedy, J., concurring). First, all of the officials' witnesses and their lawyer supported entry of the decree.

Second, the officials agreed to a decree that expressly permits further federal court proceedings concerning decree compliance. The decree explicitly "contemplates that Defendants' future activities will comport with the terms and

intent of this Decree. If this proves to be incorrect, the *parties may request relief from this Court*." L.; ¶303 (emphasis added).[15]

Third, the terms of the decree itself demonstrate that the "court had acquired jurisdiction with the assent of . . . [the officials] . . . to determine . . . the controversy presented" about the officials' failure to comply with the consent decree. *See Gunter*, 200 U.S. at 292. As is often true with consent decrees, the State officials urged entry of an order that retains the district court's jurisdiction and allows the parties to return to the district court to resolve disputes. *See*, *Kokkonen*, 511 U.S. at 381-382. The parties may "request relief from [the] Court" in the event of disputes about the officials' compliance with the order. L.; ¶303. The term "will," used throughout the decree, "creates a mandatory, *enforceable obligation*." L.; ¶302 (emphasis added). By asking the district court to enter an order that includes those terms, the officials expressly asked the court to enter an order that envisions a return to court to enforce obligations if disputes arise. The officials submitted to the district court's authority to resolve future decree compliance disputes. *See*, *Gardner*, 329 U.S. at 574. The officials clearly relinquished immunity from being haled back into the very court that they had asked to enter the order in the first place.

The officials and their lawyer did not merely urge the district court to accept a settlement. By urging the district court to enter the settlement *as a consent decree*, the officials urged the district court to enter a judgment of the court. *See*, *Rufo*, 502 U.S. at 374-375. The difference is important. Unlike a mere settlement, a consent decree embodies "an agreement that the parties desire and expect will be reflected in, and be *enforceable as*, *a judicial decree that is subject to the rules generally applicable to other*

15. When the clarity of litigation conduct is at issue, State officials need not specifically state that they "waive the Eleventh Amendment" or that they "waive sovereign immunity." The act of removal waives sovereign immunity, without mention of the Eleventh Amendment or immunity. *Lapides*, 535 U.S. at 620.

judgments and decrees." *Rufo*, 502 U.S. at 378 (emphasis added).[16]

The district court might not have jurisdiction if the parties had merely agreed to a settlement contract. But the district court does have jurisdiction to enforce the decree in this case. Not only does the decree incorporate the terms of the agreed settlement; it also sets out the terms of the settlement in the consent order itself and specifically retains the court's jurisdiction over decree compliance. *See*, *Kokkonen*, 511 U.S. 375.

The State officials could "surely anticipate" that the children would return to the district court if they believed that the officials had violated the decree. *See*, *Knight*, 321 F.3d at 1126. The decree's plain language, *see*, *United States v Armour*, 402 U.S. 673, 683 (1971), clearly shows that the parties agreed to an order that preserves the district court's ongoing jurisdiction to resolve disputes about compliance. L.; ¶303. It is fair to hold the officials to the terms of their bargain.

Finally, the officials clearly waived immunity from decree compliance proceedings in *federal* court, where the case was filed and the decree was entered. The decree allows the parties to "request relief from *this Court*" to resolve decree compliance disputes. L.; ¶303 (emphasis added). *See*, *in contrast*, *College Sav.*, 527 U.S. at 676, *citing Smith v Reeves*, 178 U.S. 436, 441-445 (1900) ("[A] State does not consent to suit in federal court merely by consenting to suit in the courts of its own creation.")

a. The court of appeals applied the wrong legal test to determine clarity of waiver. The court of appeals incorrectly held that the State officials did not unequivocally waive the Eleventh Amendment. Pet. App. 41a. The court erred by applying the wrong test. "*College Savings Bank* . . . distinguished the kind of constructive waivers repudiated there from waivers effected by litigation conduct. . . . The relevant 'clarity' here

16. The *Rufo* defendants included a State official. 502 U.S. at 372.

must focus on the litigation act . . . that creates the waiver." *Lapides*, 535 U.S. at 620. In this case, the officials clearly invoked the federal court's jurisdiction by asking the court to enter a decree that specifically allows a return to court to resolve disputes about decree compliance. L.; ¶303.

b. The State officials' denial of liability in the decree does not defeat their waiver of immunity. The court of appeals incorrectly held that the State officials did not unequivocally waive the Eleventh Amendment because "[t]he consent decree expressly states in paragraph 301 that 'Defendants do not concede liability.'" Pet. App. 41a. Disclaimers of this type are common in settlement agreements. *See*, *Suter v Artist M.*, 503 U.S. 347, 354 n.6 (1992).

The court of appeals erred because the officials' refusal to admit liability is not the same as asserting sovereign immunity. When it applies, the Eleventh Amendment provides immunity from suit — not "a mere defense to liability." *Mitchell v Forsyth*, 472 U.S. 511, 526 (1985); *see also Puerto Rico*, 506 U.S. at 146. Since decree terms must be given their natural meanings, *Armour*, 402 U.S. at 678, including "technical meaning[s]," *United States v ITT Continental Baking*, 420 U.S. 223, 238 (1975), the court of appeals should have concluded that the parties meant what they said. While the officials did not concede liability, they *did* agree to a decree that created enforceable obligations and that reserved to the district court the power to resolve disputes about compliance. L; ¶¶302; 303.

4. The Texas Attorney General Has Authority To Waive Eleventh Amendment Immunity During Litigation. Federal law determines "whether a particular set of state laws, rules or, activities amounts to a waiver of the State's Eleventh Amendment immunity." *Lapides*, 535 U.S. at 623; *see also*, *Gunter*, 200 U.S. at 287-289. If State law authorizes the State's Attorney General to represent the State in court, the Attorney General's litigation conduct can waive the Eleventh Amendment's protections. *Lapides*, 535 U.S. at 622. This is

true even if State law "does not authorize the attorney general to waive the State's Eleventh Amendment immunity." *Id*. at 621-623.

As in *Lapides*, Texas' Attorney General has authority to represent the State and State employees in court. Tex. Const. Art. IV, § 22.[17] The Attorney General also has authority to "propose a settlement agreement" to the court. *Terrazas v Ramirez*, 829 S.W.2d 712, 722 (Tex. 1991).[18] The authority to propose a settlement is particularly significant in this case because one action that waived sovereign immunity was the Attorney General's active request for the entry of the consent decree.

---

17. During every legislative session since this case began, the Texas legislature has confirmed the Texas Attorney General's authority to represent the State and its employees and to engage is "appropriate pre-trial . . . actions." 1993 TEX. GEN. LAWS, 4564, Goal A.1.1 (73rd Regular Session) (September 1, 1993 through August 31, 1995); 1995 TEX. GEN.LAWS 5260-5261, Goal A.1.1 (74th Regular Session) (September 1, 1995 through August 31, 1997); 1997 TEX. GEN.LAWS 5552, Goal A.1.1 (75th Regular Session) (September 1, 1997 through August 31, 1999); 1999 TEX. GEN.LAWS 5467, Goal A.1.1 (76th Regular Session) (September 1, 1999 through August 31, 2001), 2001 TEX. GEN.LAWS 5434, Goal A.1.1 (77th Regular Session) (September 1, 2001 though August 31, 2003).

18. During every legislative session since this case began, the Texas legislature has confirmed the Attorney General's authority to settle litigation. 1993 TEX. GEN. LAWS 4564, 4572, Rider 15 (73rd Regular Session); 1995 TEX. GEN. LAWS 5260, 5268, Rider 14 (74th Regular Session); 1997 TEX. GEN. LAWS 5552, 5558, Rider 10 (75th Regular Session), 1999 TEX. GEN. LAWS 5467, 5474, Rider 10 (76th Regular Session); 2001 TEX. GEN. LAWS 5434, 5440, Rider 8 (77th Regular Session).

C. It Would Impugn The Courts' Integrity To Allow State Officials To Actively Urge A Court To Enter A Decree And Then Assert That The Court Lacks Jurisdiction To Enforce The Decree. When State officials waive sovereign immunity by invoking federal court jurisdiction, it is important for the waiver to "stick." When State officials "'voluntarily . . . submit [. . . their] rights [concerning a decree] for judicial determination, [they] will be bound thereby and cannot escape the result[s] of [their] own voluntary act by invoking the prohibitions of the Eleventh Amendment.'" *Schacht*, 524 U.S. at 395 (Kennedy, J., concurring), *quoting Gunter*, 200 U.S. at 284.

> It would seem anomalous or inconsistent for [the officials] both (1) to invoke federal jurisdiction, thereby contending that the 'Judicial power of the United States' extends to the case at hand, and (2) to claim Eleventh Amendment immunity, thereby denying that the 'Judicial power of the United States' extends to the case at hand. And a Constitution that permitted States to follow their litigation interests by freely asserting both claims in the same case could generate seriously unfair results.

Lapides, 535 U.S. at 619.

State officials must not be allowed to trivialize the Eleventh Amendment by using it for "'unfair tactical advantage[s]'," *Lapides*, 535 U.S. at 621, *citing Schacht*, 524 U.S. at 393-394 (Kennedy, J., concurring); *see also*, *Roell v Withrow*, 2003 U.S. Lexis 3427 at *6 (April 29, 2003) ("risk of gamesmanship"). It is not fair to allow State officials to obtain concessions during negotiations and then ignore their agreed (and ordered) obligations. *See*, *Kozlowski v Coughlin*, 871 F.2d 241, 245 (2d Cir. 1989). It is not fair to expect plaintiffs to waive their right to trial in exchange for a consent decree that cannot be enforced.

It would impugn the federal courts' integrity to allow State officials to reassert immunity from enforcement of agreed

consent decrees. *See*, *Lapides*, 535 U.S. at 621. Courts should not be put in the awkward position of expending time and effort to decide whether to approve and enter consent decrees that they cannot enforce. To protect "judicial efficiency," parties should not have "the luxury of waiting for the outcome before denying the [federal] judge's authority" to enforce a consent decree. *Roell*, 2003 U.S. Lexis 3427 at *6.

Under the court of appeals' rule, district courts' decisions to adopt settlements as orders are meaningless, and so are the courts' decrees, because State officials are free to ignore validly adopted orders. This is not the proper rule of law; even federal injunctions that are "subject to substantial constitutional question" must be obeyed unless modified or dissolved. *Walker v City of Birmingham*, 388 U.S. 307, 317-19, 321 (1967); *Hook v State of Ariz. Dep't. of Corrections*, 972 F.2d 1012, 1016 (9th Cir. 1992) (subsequent history omitted).[19]

Finally, jurisdictional rules should "make sense." *Lapides*, 535 U.S. at 620. For example, *Lapides* prohibits a defendant from removing a case to federal court, having it dismissed because of the Eleventh Amendment, seeking removal again, requesting dismissal again, and on and on *ad infinitum*. In the context of consent decrees, it would not "make sense" to allow State officials to urge entry of a decree to avoid trial, and then force trial on the merits before the plaintiffs could get relief from a decree violation — and possibly yet another trial on the merits in the event of another decree violation. This dizzying cascade of events particularly does not "make sense" when the consent decree was entered because everyone agreed that trial on the merits was not necessary. *See*, *Rufo*, 502 U.S. at 390, *quoting Plyler v Evatt*, 924 F.2d 1321, 1327 (4th Cir. 1991) (should not need a "constitutional decision every time an effort was made . . . to enforce . . . the decree by judicial action.")

19. The *Walker* rule is fair because State officials may seek modification or dissolution of a decree as allowed by Federal Rule of Civil Procedure 60(b) and this Court's decision in *Rufo*, 502 U.S. 367; *see also*, *Miller v French*, 530 U.S. 327, 342-349 (2000).

D. Sovereign Immunity Does Not Bar The District Court's Enforcement Orders Because Those Orders Are Ancillary To The Consent Decree And The District Court Has Jurisdiction Over The Decree. "[T]he proposition that the Eleventh Amendment . . . control[s] a court of the United States in administering relief, although the court was acting in a matter ancillary to a decree rendered in a cause over which it had jurisdiction, *is not open for discussion*." *Gunter*, 200 U.S. at 292 (emphasis added), *followed in Lapides*, 535 U.S. at 619. Ancillary jurisdiction allows "a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees." *Kokkonen*, 511 U.S. at 380. The doctrine permits a district court to enforce a decree that explicitly retains jurisdiction over the decree and disputes about it, as is true in this case. *Id*. at 381; L.; ¶303.

The district court had clear jurisdiction over this case and the consent decree. *Verizon*., 535 U.S. at 647-648; *Ex parte Young*, 209 U.S. 123. "[J]urisdiction as to . . . [State officials] . . . has been acquired as a result of the voluntary action of the . . . [State officials] . . . in submitting . . . [their] . . . rights to judicial determination" in the decree. *See Gunter*, 200 U.S. at 292. As a result, the district court had ancillary jurisdiction to enter its later memorandum opinion and remedial order to require the State officials to develop remedial plans to bring them into compliance with the decree that they sought. Pet. App. 54a; 276a.

The court's ability to enforce its orders is particularly important because its interpretation of federal law "is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States." *Cooper v Aaron*, 358 U.S. 1, 18 (1958). State officials cannot "nullify a federal court order." *Id*. at 19. If they "had such power, . . . 'it is manifest that the fiat of a state . . . [official,] . . . and not the Constitution of the United States, would be the supreme law of the land; that the restrictions of the Federal . . . [law] . . . upon the exercise of state power would be but impotent phrases. . . .'" *Id*. *quoting Sterling v Constantin*, 287 U.S. 378, 397-398 (1932).

II. *EX PARTE YOUNG* PERMITS ENFORCEMENT OF A CONSENT DECREE THAT IS BASED ON FEDERAL LAW AGAINST STATE OFFICIALS, EVEN IF DECREE VIOLATIONS ARE NOT ALSO VIOLATIONS OF FEDERAL RIGHTS.

The court of appeals incorrectly held that "[b]efore the district court can remedy a violation of a provision of the consent decree, plaintiffs must demonstrate that any such consent decree violation is also a violation of a federal right." Pet. App. 27a-28a. The consequences will be severe if the Fifth Circuit's approach is correct. If the court of appeals is affirmed, plaintiffs will not enter into consent decrees with State official-defendants because plaintiffs will have to prove their case on the merits — that their rights have been violated — to prove that an agreed decree has been violated. Plaintiffs will not waste time and energy to negotiate decrees that cannot be enforced without a full trial. The remedial option of consent decrees will not be available to plaintiffs or State official-defendants in cases concerning ongoing violations of federal law. This does not make sense, because the consent decree option allows State officials to incorporate their judgment and discretion into agreed orders, which federal courts are supposed to encourage.

After describing the errors in the court of appeals' analysis, the children urge a better rule. If a consent decree is properly entered, it can also properly be enforced against State officials. *Firefighters v City of Cleveland*, 478 U.S. 501, 523-524 (1986) (decree entry).

A. IN *EX PARTE YOUNG* CASES, SOVEREIGN IMMUNITY DOES NOT BAR FORWARD-LOOKING ENFORCEMENT OF A CONSENT DECREE THAT PROVIDES PROSPECTIVE RELIEF. This is a classic *Ex parte Young* case because the children's "'complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Verizon*, 535 U.S. at 645, *quoting Idaho v Coeur d'Alene Tribe*, 521 U.S. 261, 296 (1997) (O'Connor, J., concurring). The children allege ongoing

violations of the federal Medicaid Act. 42 U.S.C. §§ 1396a(a)(43), 1396d(r). Further, the children seek only injunctive and declaratory relief, which are both prospective in nature.

"*Ex parte Young* is one of the three most important decisions the Supreme Court of the United States has ever handed down." 17 Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 4231 at 559 (2d ed. 1988). *Ex parte Young* is necessary to our nation's constitutional design because "prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." *Green*, 474 U.S. at 68. In accord with our constitutional design, *Ex parte Young* vests in the federal courts not only the authority but also "the *constitutional duty* to vindicate 'the supreme authority of the United States.'" *Pennhurst*, 465 U.S. at 109 n.17, *quoting Ex parte Young* (emphasis added).

The court of appeals' analysis erroneously relies on the Eleventh Amendment because "*Young* and its progeny render the Amendment *wholly inapplicable* to a certain class of suits." *Puerto Rico*, 506 U.S. at 146 (emphasis added). A consent decree enjoining State officials' violation of the Medicaid Act does "not engage the Eleventh Amendment." *Wisconsin Hosp. Ass'n. v Reivitz*, 820 F.2d 863, 868 (7th Cir. 1987) (per J. Posner).[20]

Sovereign immunity should not bar enforcement of exactly the type of prospective relief that is necessary to properly balance the important constitutional principles of the supremacy of federal law and sovereign immunity. *Alden*, 527 U.S. at 747-748. The consent decree in this case only provides the type of prospective relief that *Ex Parte Young* envisions.

Further, the subsequent remedial order is also forward-looking. It only requires Respondents to develop "proposed

20. In keeping with *Ex parte Young*, the officials did not argue in their motions to dismiss that the Eleventh Amendment prohibited suit as to them.

corrective action plans to remedy each violation of the decree" found in the memorandum opinion. Pet. App. 277a (remedial order), Pet. App. 54a *et seq* (memorandum opinion).

B. The Eleventh Amendment Does Not Require A Federal Court To Find A Violation Of A Federal Right Before Enforcing A Consent Decree. The court of appeals held that the Eleventh Amendment means that "[b]efore the district court can remedy a violation of a provision of the consent decree, plaintiffs must demonstrate that any such consent decree violation is also a violation of a federal right." Pet. App. 27a-28a. The court of appeals relied on its controversial decision in *Lelsz I*,[21] which holds that the Eleventh Amendment bars enforcement of a consent decree based on state law. 807 F.2d at 1247, *citing Pennhurst*, 465 U.S. 89.

The court of appeals' conclusion is wrong because the Eleventh Amendment does not inquire into whether rights have been violated in *Ex Parte Young* cases. For example, in *Verizon*, a local exchange carrier claimed that State officials' orders violated the Telecommunications Act of 1996's provisions concerning reciprocal compensation for local exchange networks. 535 U.S. at 635. Verizon sought prospective relief from State Commissioners, in their officials capacities, as well as other defendants.

Verizon does not ask whether the Telecommunications Act had in fact been violated to determine whether sovereign immunity barred suit. *Id*. at 646. "[T]he inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits of the claim. . . . 'An *allegation* of an ongoing violation of federal law . . . is ordinarily sufficient.'" *Id*. at 646, *quoting Coeur d'Alene*, 521 U.S. at 281 (emphasis added in

21. *Lelsz*' distinction between jurisdiction to enter a decree and jurisdiction to enforce it is "untenable." *Kozlowski*, 871 F.2d at 244. Other courts of appeals agree with the Second Circuit. *Komyatti v Bayh*, 96 F.3d 955 (7th Cir. 1996); *Duran v Carruthers*, 885 F.2d 1485 (10th Cir. 1989), *cert. denied*, 493 U.S. 1056 (1990).

Verizon original); *see also*, *Suter*, 503 U.S. at 354 n.6 (approving a consent decree entered into by State officials and based on Social Security Act provisions that did not create rights. *Id*. at 364.)

The very nature of the case before this Court demonstrates the point. There is no final judgment; the State officials' appeals to the lower court are interlocutory. Interlocutory appeal from a denial of sovereign immunity is proper precisely because the denial presents "'an important issue *completely separate from the merits of the action*'." *Puerto Rico*, 506 U.S. at 144, *quoting Coopers & Lybrand v Livesay*, 437 U.S. 463, 468 (1978) (emphasis added).

C. The Eleventh Amendment Should Not Require A "Public Mea Culpa" Or Finding That State Officials Violate Federal Law Before A Consent Decree Can Be Enforced. It should not be necessary for a district court to find a violation of rights to enforce a consent decree that State officials earlier asked the court to enter. "[A] State should not be deprived of the opportunity to avoid 'an expensive and protracted contest and the possibility of an adverse and disruptive adjudication' by a rule insisting on a 'public *mea culpa*.'" *Lawyer*, 521 U.S. at 574, *quoting Scott v United States Dep't. Of Justice*, 920 F. Supp. 1248, 1252 and n.2 (M.D. Fla. 1996) (lower court's entry of agreed redistricting plan).

As in *Lawyer*, in this case the district court assured itself that there was a sufficient basis to approve the proposed decree. The district court properly balanced the competing interests of guarding against "'disingenuous adventures' by litigants" and the advantages of an agreed settlement. 521 U.S. at 575, *quoting Scott*, 920 F. Supp. at 1252 n.2. The lower court found "a substantial 'evidentiary and legal' basis for the plaintiffs' claim[s]" before approving the consent decree. 521 U.S. 574, *quoting Scott*, 920 F. Supp. at 1252.

After a day long hearing, the district court adopted the proposed decree because it "is fair, reasonable and adequate."

Fairness Order at 1. After reviewing considerable evidence and legal arguments, the district court concluded that it was likely that the "Plaintiffs could have succeeded at trial." *Id*. at 25. *See also*, Order (filed August 10, 1994) (denying motion to dismiss).

D. The Lower Court's Rule Unduly Restricts Federal Courts' Equitable Powers. The Fifth Circuit's ruling unduly restricts the remedies that should be available — and enforceable — when State officials agree to them.[22] Consent decrees may do more than just order State officials to obey the law. For example, in *Rufo*, 502 U.S. 367, inmate-plaintiffs and jail official-defendants agreed to a consent decree to resolve the inmates' claims that jail conditions violated the Constitution. "[T]o 'save themselves the time, expense and inevitable risk of litigation, . . . [defendants] could settle the dispute . . . by undertaking to do more than [federal law] itself requires.'" *Id*. at 389, *quoting Armour*, 402 U.S. 681. Even after a properly requested modification, a consent decree in institutional reform litigation need not "conform[. . .] to the constitutional floor." *Rufo*, 502 U.S. at 391. For example, *Rufo* addressed a motion to modify a consent decree that required single bunking in a county jail. By the time of *Rufo*, it was clear that double bunking did not necessarily violate federal law. *Bell v Wolfish*, 441 U.S. 520, 542-543 (1979).

Although *Rufo* addresses claims of Constitutional violations, *Rufo*'s approach also applies to consent decrees that address violations of the Social Security Act, such as the Medicaid Act. "[P]arties may agree to provisions in a consent decree which *exceed the requirements of federal law*." *Suter*, 503 U.S. at 354 n.6 (dicta) (entry of decree concerning Adoption Assistance and Child Welfare Act) (emphasis added).

---

22. Congress' "clearest command" is required to "displace courts' traditional equitable authority." *Miller*, 530 U.S. at 340. Congress has not limited federal courts' equitable powers in the context of lawsuits like this one.

In contrast, the court of appeals erred by severely restricting the relief that consent decrees may provide. Under the lower court's rule, enforceable consent decrees can only provide relief that equals "rights" granted by federal law. To show a decree violation sufficient to justify enforcement by the court, plaintiffs would have to show that a decree violation "is also a violation of a federal right." Pet. App. 27a-28a.[23]

The lower court's limitation also runs contrary to federal courts' longstanding equitable powers. Federal courts do — and should — have plenary power to enter and enforce injunctions. *See*, *Swann v Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15-16 (1971); *Milliken*, 433 U.S. at 281-283.[24] Indeed, a federal court has the continuing obligation and discretion to interpret its decree and to determine if other orders are necessary from time to time to effectuate its purposes. *Swann*, 402 U.S. at 15-16. After proper notice and opportunity for both sides to be heard, federal courts may issue further orders to accomplish the

23. The *Lelsz II* dissent explained the error in the Fifth Circuit's analysis:

> There can be no doubt that a federal court, to remedy federal violations, may require state officers to adopt programs that, absent the federal violations, were not guaranteed to the plaintiffs by the Constitution or federal statute. The remedial program need only be tailored to cure the condition that offends federal law. *Milliken v Bradley*, 433 U.S. 267, . . . (1977); *Gates v Collier*, 501 F.2d 1291 (5th Cir. 1974). If the parties do not choose to proceed to trial, the court may, with their agreement, enter a consent decree that provides relief greater than the court might have awarded after trial. *Local 93 v City of Cleveland*, 478 U.S. 501 . . . (1986). The panel opinion is inconsistent with that clearly established law.

815 F.2d at 1036-1037 (dissent from denial of rehearing en banc by Reavley, J., with whom Clark, Chief Judge, Rubin, Politz, Randall, Johnson and Williams joined) (parallel citations omitted).

24. The *Milliken* defendants included State officials. Defendant Milliken himself was the governor of Michigan. 433 U.S. at 267-269.

aims of an earlier consent decree. *United States v United Shoe Machinery Corp.*, 391 U.S. 244, 248-251 (1968).

Although subject to review for abuse of discretion, federal courts have broad and flexible power to issue injunctions with sufficient specificity to resolve disputes. *Spallone v United States*, 493 U.S. 265, 273-276 (1990); *see also Milliken*, 433 U.S. at 281-282. For example, in disputes about segregated schools, federal courts may order remedial education programs, special in-service teacher training, changes in student testing programs or even suspension of testing, *Id.* at 282-288. These remedies are proper even though their absence does not violate equal protection requirements, because they remedy the consequences of unlawful actions. *Id*. at 288.

When using their power to fashion injunctive relief by court order (instead of by agreement), federal courts must respect State officials' exercise of their discretion to the extent possible. *Milliken*, 433 U.S. at 280-281. It would not make sense for federal courts to lack jurisdiction to enforce consent decrees, which already represent and incorporate the officials' discretion.

In this case, the district court's remedial order takes special care to respect the officials' judgment about how to come into compliance with the violated decree provisions, as *Milliken* envisions. Instead of independently imposing its own remedial requirements, the district court merely ordered the officials to propose "corrective action plans to remedy each violation of the decree." Pet. App. 276a-277a.

E. Contrary To Principles Of Basic Fairness, Under The Court Of Appeals' Rule It Would Be Impossible For Consent Decrees To Be "Specific In Terms" And "Describe In Reasonable Detail . . . The Act Or Acts Sought To Be Restrained" When State Officials Are Defendants. Fed. R. Civ. P. 65(d). "[B]asic fairness requires that those enjoined receive explicit notice of precisely what conduct is outlawed." *Schmidt v Lessard*, 414 U.S. 473, 476 (1974) (per curiam). To "prevent uncertainty and confusion on the part of

those faced with injunctive orders," *id.*, prospective relief "shall be specific in terms; [and] shall describe in reasonable detail . . . the act or acts sought to be restrained." Fed. R. Civ. P. 65(d).

To protect the supremacy of federal law, federal courts must be able to provide prospective relief from State officials' violation of law. *Green*, 474 U.S. at 68. But, the court of appeals' rule makes it impossible to agree to enforceable consent decrees in cases involving State official-defendants. Consent decrees cannot meet the standards of both the Fifth Circuit and the Federal Rules of Civil Procedure. If a consent decree cannot be enforced unless "any such consent decree violation is also a violation of a federal right," Pet. App. 27a-28a, it is impossible for consent decrees to be drafted with sufficient specificity and detail to meet Fed. R. Civ. P. 65(d)'s requirements. For example, a consent decree that simply required State officials to "comply with federal EPSDT law," or "protect the children's EPSDT rights" would not adequately inform the officials of what conduct is required.

F. Contrary To Important Principles Of Judicial Administration, The Court Of Appeals' Rule Would Make Consent Decrees Useless In Cases Against State Officials. If a decree's remedies cannot be enforced unless violation of the decree also violates federal rights, then the parties can gain nothing by entering into a consent decree. To enforce the decree, the plaintiffs would have to start at square one, as if they were proceeding to trial to prove that their rights had been violated — not simply that the decree had been violated. There would be a "disincentive to negotiation of settlements in institutional reform litigation" because trial on the merits would still be required if plaintiffs ever sought a judicial order of enforcement. *See*, *Rufo*, 502 U.S. at 389.

Prohibiting enforcement of a consent decree unless a decree violation is also a violation of rights would mean that "'the only *legally enforceable* obligation assumed by the state under the consent decree was that of ultimately achieving

minimal [lawful] standards. . . . Substantively, this would do violence to the obvious intention of the parties that the decretal obligations assumed by the state were not confined to meeting minimal [legal] requirements.'" *Id*. at 390, *quoting Plyler*, 924 F.2d at 1327 (emphasis in *Plyler* original).

It is in the public interest, the judiciary's interest and even State officials' interest for State officials to be able to enter into consent decrees that can be enforced without a return to what is in essence a trial on the merits. Federal court proceedings will be longer and more complex if consent decrees are not a practical and useful way to resolve disputes against State officials. Federal courts will be forced to intrude into State officials' affairs more than they do when they enter and enforce decrees — which represent the officials' discretion about resolving disputes. The public interest is not well served by the increased cost and delay that will result if State officials cannot amicably resolve litigation about important issues via settlement.

Finally, if the Fifth Circuit's rule becomes the law of the nation, plaintiffs and State officials will lose an important remedial option because it will not be worth it for plaintiffs to enter into consent decrees with the officials. Neither plaintiffs nor State officials will have a viable option to settle cases, because plaintiffs will not agree. This result would not make sense, particularly in *Ex Parte Young* cases, which often involve complex disputes that are best resolved by decrees that incorporate State officials' judgment.

G. When A Federal Court Properly Enters A Consent Decree In A Case Based On Federal Law, Sovereign Immunity Does Not Bar Enforcement Of The Decree Against State Officials. The correct approach to determining if a federal court can enforce a consent decree is simple: "If a federal court can validly enter a consent decree, it can surely enforce that decree." *Kozlowski*, 871 F.2d at 244. Otherwise, consent decrees would be meaningless because it would be solely up to State officials whether or not to comply. Federal courts

and their orders should not be so demeaned. Further, courts should not have to make difficult jurisdictional decisions "'every time an effort [is] made to enforce or modify the decree by judicial action.'" *Rufo*, 502 U.S. at 390, *quoting Plyler*, 924 F.2d at 1327.

To be properly entered, a consent decree "must (1) 'spring from and serve to resolve a dispute within the court's subject-matter jurisdiction'; (2) 'come within the general scope of the case made by the pleadings'; and (3) 'further the objectives of the law upon which the complaint was based.'" *Firefighters*, 478 U.S. at 525. When these three elements are established, "a federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial." *Id*. at 525.

Firefighters should also determine if a district court can enforce its decree. *Firefighters'* first factor assures that district courts only enter decrees if the courts have jurisdiction over the dispute. As a consequence, the courts will only enforce consent decrees in cases where they already have jurisdiction.

This case meets the *Firefighters* test. The court has jurisdiction because this case presents a dispute about a federal question — compliance with the federal Medicaid Act. 28 U.S.C. § 1331; 42 U.S.C. § 1396 *et seq*.

Further, the consent decree comes within the general scope of the pleadings. The complaint raises, and the consent decree resolves, disputes about the officials' failure to comply with the Medicaid Act's EPSDT requirements. 42 U.S.C. §§ 1396a(a)(43); 1396d(r).

1. Congress' Purposes In Medicaid And EPSDT. The consent decree (and the sections of the decree raised in the children's motion to enforce it) furthers the objectives of the federal Medicaid statute and its EPSDT provisions. Medicaid's purpose is to 1) assist those "whose income and resources are insufficient to meet the costs of necessary medical services"

and 2) assist "families and individuals attain or retain capability for independence or self-care." 42 U.S.C. § 1396.

Consistent with these important goals, EPSDT establishes a common-sense health care program for indigent children. 42 U.S.C. §§ 1396a(a)(43); 1396d(r). EPSDT provides for a comprehensive range of health care services. The "foundation" is preventive screens ("check ups"). Fairness Order at 6. Congress clearly "desire[s] to require participating states to provide eligible children with a comprehensive *preventive* . . . program." *Mitchell v Johnston*, 701 F.2d 337, 348 (5th Cir. 1983) (emphasis in original).

In addition to preventive care, EPSDT requires the officials to provide the children with all necessary health care services that the Medicaid Act authorizes, even if those services are optional for adults. 42 U.S.C. §§ 1396a(a)(43)(C); 1396d(r)(5); The officials have an "obligation to provide to children under the age of twenty-one *all necessary services*." *Pereira v Kozlowski*, 996 F.2d 723, 726 (4th Cir. 1993) (emphasis added). *See*, *also*, *Pittman v Secretary*, *Florida Dep't of Health and Rehabilitative Services*, 998 F.2d 887, 889, 891-892 (11th Cir. 1993); *Miller v Whitburn*, 10 F.3d 1315 (7th Cir. 1993).

Finally, State officials must inform the children about the services that are available to assist the children to actually obtain services. 42 U.S.C. §§ 1396a(a)(43)(A) (informing). The officials must either provide or arrange for health care services that children need, including screens. 42 U.S.C. §§ 1396a(a)(43); (B); (C) (provide or arrange screens and other services).

The entire package of EPSDT services furthers the Medicaid Act's important goals of providing indigent children with health care to allow them to attain or retain independence. 42 U.S.C. § 1396. "EPSDT "is important for children. . . . [I]t's a way to get them into a system of care so that hopefully they break the cycle of poverty life by not having to miss school. . . ." Testimony of Dr. Lopez, the officials' former Dental Director, *quoted in* Fairness Order at 8; *see*, *also*, *Id*. at 10-12.

2. The Consent Decree Furthers Congress' Purposes In Medicaid And EPSDT. The decree itself indicates that the order was negotiated with federal EPSDT and Medicaid law and purposes in mind. "[T]he agreements negotiated by the parties which led to this Order were reached *within the framework of federal law related to the EPSDT and Medicaid programs* as it existed prior to the execution of the Court's Order." L; ¶308 (emphasis added). As the decree notes, and as the State officials agreed, Texas' "EPSDT program can be improved." L.; ¶5.

Each consent decree provision raised in the children's motion to enforce the decree furthers Congress' stated purpose in enacting Medicaid and EPSDT, as follows:

The decree requires the officials to assure that all children, including at risk subgroups, receive medical and dental screens. L.; ¶¶2, 3, 143, 192, 212. Medical and dental screens are an essential aspect of EPSDT. 42 U.S.C. § 1396a(a)(43)(B). As the State official's EPSDT Director agreed, it is "certainly" important — as well as required by federal law — for all children to get complete check ups. Enforcement TR V-928;12-16 (Mr. Millwee, the officials' EPSDT Director).[25]

Further, the decree requires the officials to properly implement outreach and reports about it. L.; ¶¶32, 52. Congress did not write a "dead letter" when it wrote the Medicaid Act. *Wilder*, 496 U.S. at 514, *cited with approval in Gonzaga*, 536 U.S. at 280, 289 n.6. *Effective* outreach is an important aspect of the State officials' efforts to inform all of the children about EPSDT. 42 U.S.C. § 1396a(a)(43)(A). Outreach is intended to

25. The officials must develop and implement plans so that children in all areas of the State get medical screens and dental check ups, to increase the use of check ups in counties where few children get them. L.; ¶¶273-281. The corrective action plan provision protects the officials' discretion. They may use various appropriate means to address the different problems in each county, such as increasing or improving outreach, transportation, or the supply of health care providers to assist children. L.; ¶281.

increase the children's use of EPSDT services, including screens, by educating them about available services. Fairness Order at 27-28; 42 U.S.C. §§ 1396a (a)(43)(B) & (C).[26]

The officials must properly implement managed care so that children receive the full range of EPSDT services, including medical and dental screens: L.; ¶¶190, 192. Congress enacted EPSDT to provide indigent children with screens and follow up health care. 42 U.S.C. §§ 1396a(a)(43)(B) & (C). This purpose is furthered when all children receive services, regardless of the health care delivery system that the officials choose for them.

The decree requires the officials to promptly answer all toll-free number calls to assist the children to schedule appointments and obtain transportation. L.; ¶247. The officials' toll-free numbers implement the informing, screening and services aspects of the officials' EPSDT obligations. They are one way that the State officials 1) provide information about EPSDT and Medicaid to the children; Enforcement TR V-958;7-10 (Mr. Millwee); 42 U.S.C. § 1396a(a)(43)(A); 2) accept "requests" for screens. Pet. App. 274a-275a; 42 U.S.C. § 1396a(a)(43)(B); and 3) "arrange" screens and other health care services that the children need. Enforcement TR V-959;5-12 (Mr. Millwee); 42 U.S.C. §§ 1396a(a)(43)(B) (screens); (C) (other necessary health care). For example, toll-free number staff may arrange services for the children by scheduling appointments for health care or scheduling transportation to enable the children to get to and from their appointments. L.; ¶¶239-240; 243-245.

---

26. The district court also has authority to order State officials to file reports to assist the court to determine if the officials are complying with the court's orders. *See*, *Hutto v Finney*, 437 U.S. 678, 683 (1978) (reports on State officials' progress) (dicta); *Dunn v New York State Dep't of Labor*, 47 F.3d 485, 488-489 (2d Cir. 1995).

The officials also must provide case management to all children who need it. L.; ¶¶248, 264. The Medicaid Act authorizes the case management service. 42 U.S.C. §§ 1396d(a)(19); 1396n(g). As a result, the officials must provide it to children who need it. 42 U.S.C. §§ 1396a(a)(43)(C); 1396d(r)(5). Congress' purpose is furthered by requiring the officials to provide case management to all children who need it, and not just to the spotty groups of children who could get case management before the decree was entered. L; ¶248; Fairness Order at 33.

"To adequately serve [the children], providers must understand how EPSDT works. They must also understand EPSDT recipients' needs." L.; ¶104; *see also*, ¶¶ 107-108, 112-114, 117-120, 124-130; 194. As part of prospective relief, federal courts may require State officials to participate in training professionals to assist children. *Milliken*, 433 U.S. at 286-287. Further, training for health care professionals is proper in this case. Normally, the State officials "arrange" screens and other services by referring the children to health care providers and managed care organizations instead of providing services themselves. *See*, 42 U.S.C. §§ 1396a(a)(43)(B) & (C) ("arrange" screens and other services). Having chosen this approach, the officials must ensure that their contracted health care providers can properly assist the children to obtain all services that they need.

The decree also requires the officials to assess and improve the transportation program annually. L.; ¶¶223-229. The transportation program assists families to "arrange" health care for the children. 42 U.S.C. § 1396a(a)(43)(B) (screens); (C) (other health services); Enforcement TR V-959;5-12 (Mr. Millwee).

Finally, the decree requires the officials to report properly on agreed health outcomes measures. L.; ¶¶295, 296. Outcomes reports "measure important aspects of the [children's] health . . . [and] . . . gauge the health of the entire EPSDT population,

not merely factions of the population." L.; ¶289. The reports assist both the State officials and the district court to determine whether the children actually receive the full range of health care that Congress envisioned for them. 42 U.S.C. §§ 1396a(a)(43)(B) (screens); (C) (treatment); 1396d(r). As the State officials agree, "it is very important to have some measures of how we are doing . . . , so we would know . . . that our program was working so we would get measures that would say, yes, children really are getting better. . . ." Fairness TR 116;23-24; *Id*. 119;24 to 120;2. (Dr. Koops); *see also* Enforcement TR III-513; 4-24 (Mr. Blanton, MPH, Texas Department of Health, Epidemiologist).

To ensure the supremacy of federal law, district courts must be able to enforce forward-looking consent decrees. In this case, the district court properly enforced decree requirements, which meet the *Firefighters* test.

The court of appeals improperly rejected this Court's *Firefighters* standard and ignored *Rufo*'s recognition that consent decrees are not bound by the minimum requirements of federal law. Instead, the Fifth Circuit incorrectly extended its controversial *Lelsz* decision to prohibit enforcement of a consent decree that prospectively enforces federal Medicaid law. This was wrong. The court of appeals' decision should be reversed and vacated because it misapplied the Eleventh Amendment and ventured into an irrelevant discussion of "rights."

CONCLUSION

The children respectfully ask this Court to 1) hold that sovereign immunity does not bar the district court from enforcing the consent decree in this case, 2) reverse the decision of the court of appeals concerning sovereign immunity 3) vacate the remainder of the court of appeals' decision because it is not necessary to resolve the questions presented and 4) remand for further proceedings.

Respectfully submitted,

Susan Finkelstein Zinn
Counsel of Record
P.O. Box 15126
San Antonio, TX 78212
(210) 734-0425

Jane Kathryn Swanson
2202 Timberloch Place, #112
The Woodlands, TX 77380
(281) 367-4483

Edward B. Cloutman III
3301 Elm Street
Dallas, TX 75226
(214) 939-9222

Professor Barbara Bader Aldave
University of Oregon
School of Law
1515 Agate Street
Eugene, OR 97403
(541) 346-3985

Attorneys for Petitioners